N THE SUPREME COURT OF THE UNITED

OCTOBER TERM, 1953

No. 87

UBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellants,

vs.

UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD,

Appellees

PPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

EVERETT C. McKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
Counsel for Appellants,
514 State Building,
San Francisco 2, California.

INDEX

CITATIONS

Cases:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellants,

vs.

UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

Additional Argument

I. The lower Court had no jurisdiction to decide this case upon its merits because appellees are subject to no irreparable injury which entitles them to equitable relief and there is no case or controversy which entitles them to declaratory relief.

The only action taken by appellants in connection with appellee air carriers' operations between the mainland of

California and Catalina Island has been (1) to send administrative letters instructing United to file tariffs covering such operations with the State Commission and (2) to inform appellees that if the Federal District Court injunction is dissolved and United still refuses to file tariffs that the State Commission intends to institute an investigation to determine whether it has authority to establish rates for the operations in question, and, if so, to proceed to establish such rates pursuant to law.

Both appellants and appellees agree that appellee air carriers are not in contempt of the State Commission nor subject to penalties under Section 2107 of the Public Utilities Code by reason of United's refusal to file tariffs as instructed in the administrative letters set forth in Appendix B of appellants' brief and R. 37-46. Section 22 of Article XII of the California Constitution only authorizes the State Commission to establish rates.

Appellants agree with appellees that a construction of Section 2107 which would authorize the bringing of penalty actions against United for refusal to comply with the administrative letters in question would violate the Fourteenth Amendment. As appellee air carriers have been so careful to point out, there is no provision in the public Utilities Code for judicial review of administrative letters. Such letters are issued without notice and without hearing.

Sections 2107 and 2113 of the California Public Utilities Code are not in issue in this proceeding.

Appellees nevertheless claim and the lower Court has found that appellee air carriers are subject to a risk that penalties will be imposed under Section 2107 of the Public Utilities Code. Such findings can be based only on the absurd assumption that the State administrative officials in their enforcement of Section 2107 have no right to deter-

mine its proper scope of application but must blindly seek to recover penalties willy-nilly whatever their honest opinion as to the proper application of this Section. The State administrative officials, the same as the State and Federal judicial officers, are bound to apply the provisions of said Section 2107 in accordance with their best conception of its lawful application. The claims of appellee air carriers and the findings of the lower Court that appellee air carriers are subject to the risk of penalties are not supported by the record. We do not believe this Court will be misled by the straw man set up by appellee air carriers.

Appellee air carriers in their brief have indicated that appellants have confused the issues in their opening brief. If appellants have done so, it is only because appellants themselves have been confused by the claims of appellees and the opinion and findings of the lower Court.

For example, Finding 12 states (R. 60-61): "Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day *that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission.*" (Emphasis added.) *No such statutes exist.* Now appellee air carriers in their brief state that the administrative letters instructing United to file tariffs are directives within the meaning of Section 2107 of the Public Utilities Code, and at the same time they say that such an interpretation of Section 2107 would be unconstitutional under the Fourteenth Amendment. Appellants agree that such interpretation would be unconstitutional, and they do not propose so to construe Section 2107.

The lower Court has made no clear finding that the administrative letters in question are enforceable directives within the meaning of the penalty Section 2107. The lower

Court said that it did not even reach the constitutional issue. Nevertheless, without considering the proper application of the penalty provisions of Section 2107 the lower Court in Finding 13 stated (R. 61): "The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, . . ."

We also wish to point out that the term "instruct" and not "direct" was used in the administrative letters in question. In other words the State Commission was informing United of the State Commission's opinion regarding its authority to establish the rates in question.

The opinion of the lower Court is inconsistent with its findings. The opinion states (R. 48-49): "We do not reach nor decide the issue tendered, that the state statute [Section 2107 of the Public Utilities Code] is unconstitutional. If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself." Then follows a list of cases on which appellants rely. The lower Court would not have dissolved itself if appellees had raised a *substantial* question regarding the constitutionality of Section 2107 of the Public Utilities Code, the enforcement of which appellees were seeking to enjoin. To dissolve itself the lower Court would have had to determine either (1) that the constitutional question was not substantial, (2) that the statute itself was constitutional even though the proposed application of the statute by the administrative officials might be unconstitutional, or (3) that the Court had no jurisdiction to consider the question.

Appellee air carriers in their brief have stated that if United had filed its tariffs pursuant to the instruction in

the administrative letters the rates in question would have been established, the administrative process would have been completed and the matter would have been at an end. But that is not the case here. By reason of United's refusal to file the tariffs in question the administrative process is only at its inception. Even though United offered its tariffs of the rates in question for filing with the State Commission, the State Commission would have to exercise its administrative expertise in determining whether to accept or reject the proposed tariff filing. If the filing were rejected an administrative hearing might be held to establish the proper rates for the operations in question.

Suppose the present injunction is dissolved, but the State Commission, nevertheless, does not carry out its present intention of holding an investigation proceeding, or suppose it conducts an investigation proceeding but does not require the establishment of the rates in question. In either such event will the appellees be concerned with the instruction set forth in the administrative letters previously referred to? Appellees may speculate that neither such course of conduct on the part of the State Commission is likely in view of the authorities supporting jurisdiction in the State Commission, but until the Commission has completed its quasi-legislative processes there is no statute (we are here referring to a State Commission order issued pursuant to the provisions of the Public Utilities Code) which is subject to attack by complaint for injunction or declaratory relief or both.

In the case of *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237, 240-241, this Court said:

> "• • • In addition to defects that will appear in our discussion of declaratory relief, it is wanting in equity because there is no proof of any threatened or probable

act of the defendants which might cause the irreparable injury essential to equitable relief by injunction."

That there was possible injury to the carrier in the *Wycoff* case is apparent from the facts as stated by this Court as follows:

> "In this connection, *Wycoff Co.* v. *Public Service Commission,* 227 P. 2d 323 (1951), is brought to our attention. From this it appears that respondent and its predecessors in interest long made it a practice to obtain from the Utah Commission certificates to authorize this carriage of film commodities between points in Utah. But the Supreme Court of Utah, in the cited case, sustained the Commission in denying such an application upon a finding that the field already was adequately served. We are also told that the Commission filed a petition in Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served and nothing in the record tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the State without the Commission's leave. What respondent asks is that it win any such case before it is commenced." (344 U. S. 244-245).

In the case now under consideration the State Commission has made no threats or attempts to enjoin appellee air carriers from operating. It is only seeking to be permitted to hold a formal investigation proceeding looking to the establishment of the rates in question if the State Commission determines it has authority to do so.

On page 9 of appellee air carriers' brief in their statement of the facts they point out that in their complaint they alleged:

> "* * * that the Commission claimed that the State statute authorized the bringing of 'numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc., may be recovered together with interest and, if the violation was wilful, with exemplary damages in undefined amounts * * *' "

We wish this Court to note that appellee air carriers failed to maintain their burden of proof in connection with this allegation and that the lower Court consequently made no findings or conclusions in relation thereto. Such allegation was denied in appellants' answer and we here reiterate that such allegation is untrue.

On page 26 of their brief appellee air carriers state that appellants have overlooked the following statement of Judge Murphy relating to threat of irreparable injury:

> "* * * the nub of our decision. We held as a matter of fact, intent is a question of fact, that you had threatened irreparable injury. We found that."

This statement has not been overlooked but perhaps should be further explained. As previously stated on page 7 of our jurisdictional statement the lower Court struck the following language from the proposed findings:

> "* * * Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

Hence, the threat to which Judge Murphy made reference was undoubtedly the admitted intention of the State Com-

mission to institute a formal quasi-legislative investigative proceeding inquiring into the establishment of rates for the transportation in question. We have previously shown in our opening brief, pages 24-25, that such a proceeding will not subject appellee air carriers to such irreparable injury as will entitle them to equitable relief.

In facing up to the burden of establishing that the lower Court's finding, that appellee air carriers are subject to a threat of irreparable injury, is not supported by the record, appellants are willing to stipulate that they will bring no penalty actions or contempt proceedings against United Air Lines, Inc., or Catalina Air Transport with respect to their failure to file tariffs covering the Catalina operations here in question unless the following conditions obtain:

1. There shall be a final decision ordering appellee air carriers, or either of them, to file tariffs covering their operations here in question, which final decision shall have arisen out of a proceeding instituted before the State Commission for the purpose of subjecting said air carriers' rates and charges in question to the jurisdiction of the State Commission, and

2. Said air carriers, or either of them, shall thereafter refuse to file such tariffs as directed by said decision.

Even under such circumstances penalties will not be sought and contempt proceedings will not be instituted for any refusal to file tariffs covering the rates and charges in question prior to the finality of the State Commission's said decision.

This offer of stipulation should not be construed as an indication that penalty actions or contempt proceedings necessarily will be instituted under the circumstances stated in the stipulation.

During the trial of the case a somewhat similar stipula-

tion was offered by appellants and rejected by appellee air carriers (R. 179).

The investigatory powers of the State Commission are not limited to the investigation of matters over which it presently has jurisdiction. It may conduct an investigative proceeding to determine whether it does or should have jurisdiction. Even though it concludes that it does not have jurisdiction over the matters of the investigation the State Commission may make findings and recommendations regarding proposed legislation relating thereto.

We are pleased to note that the brief for the Civil Aeronautics Board has confined itself to the merits, and that the Government has not urged this Court to determine that the amounts which appellee air carriers may expend in responding to a subsequent investigation before the State Commission are the proper subject matter of this action and constitute such irreparable injury as will entitle appellee air carriers to equitable and declaratory relief. *A redetermination of this issue in favor of appellant is of vital concern both to Federal and State administrative agencies alike.*

We again respectfully submit that the lower Court had no jurisdiction to decide this case on its merits because appellees are subject to no irreparable injury which will entitle them to equitable relief and there is no case or controversy which will entitle them to a declaratory judgment.

II. Until the administrative processes of the State Commission are exhausted the State and Federal Courts have no jurisdiction.

The hue and cry now being raised by the appellee air carriers about the penalty provisions of Section 2107 of the Public Utilities Code and the contempt provisions of Section 2113 of said Code is a smoke screen calculated to divert this Court's attention from the real and decisive issue in this case *which is the doctrine of the exhaustion of adminis-*

trative remedies. This latter issue is a jurisdictional hurdle over which appellees seek to spring by minimizing it and magnifying the make-weight issue of irreparable injury.

We agree with appellee air carriers that one of the basic reasons underlying the doctrine of exhaustion of administrative remedies is to take full advantage of administrative expertness, and to insure that the administrative agency has an opportunity first to decide the questions involved.

Appellee air carriers on page 42 of their brief state that we are here not concerned with a *rate case. That is exactly what we are concerned with.* Does anyone think that if the State Commission is permitted to hold a formal investigatory proceeding and determines that it has jurisdiction to establish the rates in question that the proceeding will stop there? Of course, not. In such event the State Commission will in the exercise of its administrative expertness establish the rates in question. *Without exhaustion of the admininstrative process the Federal Court did not have the entire case before it for consideration.*

Another basic reason for the requirement of the exhaustion of the administrative process is *to maintain and preserve orderly procedure.* The present proceeding is a good example of the complications which may develop when that orderly procedure is not followed.

In the case of *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, this Court, by a *per curiam* opinion, reversed the Court of Appeals of the District of Columbia, 156 Fed. 2d 821, which latter Court had reversed the District Court for the District of Columbia, 60 F. Supp. 907. This Court held that the utility had not exhausted its administrative remedies and was not, therefore, entitled to either declaratory or injunctive relief, although the record showed that the Federal Power Commission had issued against the utility an order to show cause and a supplemental order to show cause why the utility should not be required to make a very substantial reclassification of

its accounts and, further, ordered the utility to respond under oath to certain matters and to present a plan for the disposition of substantial amounts reflected in the utility's adjustment accounts. For the purpose of the orders to show cause, the Federal Power Commission assumed that it had jurisdiction and issued orders and directives to the utility. Notwithstanding these facts, this Court held that neither declaratory nor injunctive relief was availbale to the utilty because it had not exhausted its administrative remedies before the Federal Power Commission. The utility contended that the State authority had exclusive jurisdiction over the subject matter of the case (exclusive authority over accounts) and that the Federal Power Commission was without jurisdiction. State authority made the same contention and had actually exercised its asserted jurisdiction. Ninety-eight percent of the business of the utility was purely intrastate.

In this case, the Court of Appeals pointed out that no final order had been issued by the Federal Power Commission and, therefore, the utility could not appeal from the action thus far taken by said Commission and advanced this fact as a justification for judicial relief. The Court of Appeals, in reversing the District Court's dismissal of the complaint by the utility for injunction and declaratory relief, observed that a hearing before the Federal Power Commission would be a mere formality for the reason that it appeared that the Federal Power Commission's action clearly foreshadowed that said Commission was of the opinion that it had exclusive jurisdiction over the primary accounts of the utility. The United States Supreme Court, nevertheless, held in a *per curiam* decision that the utility had not exhausted its administrative remedies before the Federal Power Commission and reversed the judgment of the Court of Appeals.

It is a rule of law, generally recognized, that a court or other adjudicatory tribunal is not disqualified to pass upon

a petition for rehearing or a motion for a new trial just because the same court or other tribunal rendered the decision respecting which such rehearing or new trial is asked. The same rule prevails where a court has decided an important legal principle in one case and a subsequent case comes before it involving the same principle. The court is not disqualified or considered biased in the later case.

In California, a party *must* file a petition for rehearing respecting the decision of the State Public Utilities Commission as a condition precedent to seeking judicial review and in the petition for rehearing must set out any ground upon which he will rely in seeking judicial review (Sections 1731-1732 of the Public Utilities Code). Filing a petition for rehearing is not considered to be an idle or useless act.

It is the law in California that, where a party is entitled to although not required to file a petition for rehearing with an administrative agency, such filing of a petition for rehearing is a jurisdictional condition precedent to judicial review, although there is no statutory specification or provision on the point. This rule is a judicially created one. *Alexander* v. *State Personnel Board*, 22 Cal. 2d 198, 199-200.

The rule as to exhaustion of administrative remedies as a condition precedent to judicial review is jurisdictional in California. *U. S.* v. *Superior Court*, 19 Cal. 2d 189; *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280.

III. As an adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action, the Federal District Court should have refused to exercise jurisdiction in this case.

We wish to point out an inconsistency in appellee air carriers' brief. On pages 33-34 they argue that the administrative letters in question are orders which were issued after

hearing and reissued after rehearing. The contrary argument is made concerning the Johnson Act on pages 49-50 where they contend that no hearing has been given with respect to the subject matter of the administrative letters.

Appellee air carriers on pages 43-44 of their brief have shown that the administrative letters under consideration in this case are not subject to judicial review by the California Supreme Court because they are not decisions or orders of the Commission. They are only unenforceable instructions, and no purpose would be served by their review. We ask why should appellee air carriers want to have these letters reviewed and why did the lower Federal court review them? Appellee air carriers state on page 55 of their answering brief that exhaustion of the administrative remedies and state review will be the exhaustion of the litigants. Appellants would remind them that judicial review in the Federal courts can be exhausting, too.

For purposes of applying Sections 2107 and 2113 of the California Public Utilities Code the State Commission has consistently construed the terms "rule", "regulation", "direction", "demand", or "requirement" as being synonomous to a formal decision or order of the State Commission. We again point out to this Court that when this Commission has issued an enforceable "direction", "demand", or "requirement" in the form of an order or decision, the laws of the State of California provide for speedy and adequate review in the State courts (Sections 1756-1767, Public Utilities Code) and the Federal laws provide for speedy and adequate review in this Court, if necessary.

Appellee air carriers state on page 52 of their answering brief:

> "But none of the considerations underlying the doctrine of equitable abstention present in *Pullman*, *Burford*, *Alabama*, and *Wycoff*, are involved in this case. There are no questions concerning a specialized

> field of state law with which federal judges are not familiar. There is no need for administrative expertise to solve this dispute. There are no unresolved questions of State law. . . ."

We vigorously disagree. By reason of the lower Court's apparent finding that the administrative letters in question are final administrative directives which subject appellee air carriers to the risk of penalty suits and contempt proceedings contrary to the real effect of such letters, there are numerous unresolved state issues involved in this proceeding.

The first is what effect should be given to the administrative letters in question? Are they final enforceable administrative directives under the State Constitution and statutes? If so, how are they enforceable? By contempt proceedings before the State Commission? By the institution of penalty actions under Section 2107 of the Public Utilities Code? Is Section 2107 applicable to air carriers? This same question is now before the California Supreme Court for determination in two cases which it has under consideration, appellee United being a party to one of the actions. Assuming the administrative letters are final enforceable directives are they reviewable by the California Supreme Court as orders of the State Commission? Are Sections 170 and 171 of the California Government Code which clarify the territorial boundaries of the State of California, valid under the California Constitution? The initial determination of these State issues can best be made by the State courts.

If the State issues are resolved in favor of appellees by the State courts, the Federal courts may not have to concern themselves with the Federal issues. *If necessary, the Federal issues can be resolved by this Court with the record clear of the various State issues.*

In the view of appellants the lower Federal court has already made several erroneous determinations with re-

spect to the State law here involved. It has found that the State statutes impose penalties upon United for failure to file tariffs with the State Commission. It apparently has found that the administraitve letters are directives within the meaning of Section 2107 of the California Public Utilities Code. In finding that no adequate remedies exist in the State courts it apparently has found that even though the administrative letters may be enforceable under the State law by penalty actions such letters are not orders which are reviewable by the California Supreme Court. By finding that a portion of the waters between the mainland of California and Catalina Island are not within the boundaries of the State of California it impliedly decided that Sections 170 and 171 of the California Government Code are in violation of the provisions of the California Constitution.

Appellee air carriers do not want to maintain that delicate balance which exists in the relationship between the Federal and State governments. They want to tip the scales to complete Federal control. Their position was made clear in United's brief filed with this Court in the case of *United Air Lines* v. *Commission*, 342 U. S. 908. However, at page 74 of their brief, appellee air carriers state that they do not, in this proceeding, contend that Federal authority has superseded State authority as applied to economic regulation of intrastate operations of air carriers. They say that the operations here concerned are interstate air transportation as defined by the Federal act.

Their strange conception of the delicate balance which they think should exist is well set forth in their brief in the instant proceeding, pages 50-55, wherein they say, on the one hand, that the Federal District Court should not permit the Civil Aeronautics Board to be placed in a position where it might find it desirable and advisable to intervene in a proceeding before the State Commission, but, on the other hand, that the State Commission had the opportunity to and should have intervened in the proceedings in which the certificates of public convenience and necessity

covering the route in question were granted and renewed to appellees by the Civil Aeronautics Board.

IV. The route in question is wholly within the boundaries of the State of California, and the rates in question are intrastate rates which may be established by the State Commission.

Section 1 of Article XII of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

> "Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwestererly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

The California Constitution of 1849 which included the above definition of its boundaries was presented to the Congress of the United States on February 13, 1850. The Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

The phrase "*Also all the islands, harbors, and bays along and adjacent to the coast.*" is a phrase which *is a part of the definition of the boundaries of the State of California.* It is not a phrase stating that such islands, harbors, and bays shall be a part of the State of California in addition to the lands and waters included within the previously defined boundaries of the State.

The westerly boundary of California begins at a point on the southern boundary line which is three English miles from the Pacific Coast and runs in a northwesterly direction

and follows not the "Pacific Coast" but the "direction of the Pacific Coast" three English miles in the Pacific Ocean beyond the Pacific Coast and "all the islands, harbors, and bays along and adjacent to the coast."

All the lands and waters (including San Pedro Channel between the Pacific Coast and Catalina Island) included within the boundaries of the State of California as so defined are a part of the State of California and a part of the United States of America.

Sections 170 and 171 of the California Government Code do not purport to extend the boundaries of the State of California beyond the boundaries of the United States. These sections of the Government Code define the boundaries of the State as they were defined in Section 1 of Article XII of the California Constitution of 1849 in terms which will not be misconstrued in the manner appellee air carriers, the Civil Aeronautics Board, and the lower Federal Court have misconstrued the provisions of said Section 1 of Article XII of the original Constitution of California.

Section 1 of Article XXI of the present California Constitution is the same as Section 1 of Article XII of the original California Constitution of 1849 except that the phrase was revised to read: "Also *including* all islands, harbors, and bays along and adjacent to the coast." (Emphasis added.)

In determining that the bay of Monterey, which is a body of water having headlands approximately eighteen miles apart and a total depth of approximately nine miles, is within the boundaries of the State of California, the California Supreme Court had the following to say regarding the boundaries of the State, *Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235, 242-243:

> "It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn

over the indefinite region known as California and its adjacent islands, inlets and seas; but the interesting fact may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention, wherein as between these two powers, which were then the greatest maritime powers of the known world, *it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain for a distance of ten leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia River on land and to a distance of ten leagues into the ocean were conceded and confirmed.* [Emphasis added.]

"This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion. *By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of Cali-*

fornia and for a considerable though perhaps indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast. [Emphasis added.]

"When in the course of events the duly constituted framers of the constitution of California assembled at Monterey in the autumn of 1849 and proceeded to frame the first constitution of California they inserted in article XII thereof a description of the boundaries of the state which, in so far as the southerly and westerly lines thereof were concerned, read as follows: 'Thence running west and along said boundary line [the Mexican boundary] to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. *Also all the islands, harbors and bays along and adjacent to the coast.*' This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast. . . ."

Similarly the language of the first constitution of California in view of the past political history of California would clearly seem to include within the boundaries of the State of California the Island of Catalina and the waters of San Pedro Channel intervening between the mainland of California and Catalina Island.

We also wish to point out that the case of *United States* v. *California*, 332 U. S. 19, involved a complaint to determine the ownership of submerged lands off the coast of California between the low water mark and the three-mile limit. The fact that this Court found that such ownership was vested

in the United States does not preclude this Court from finding that the intervening waters between the mainland of California and Catalina Island are within the boundaries of the State of California, or that in any event the rates of air carriers for transportation wholly between the mainland of California and Catalina Island may be established by the State Commission pursuant to the provisions of Section 22 of Article XII of the State Constitution. In fact this Court conceded that the State has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries.

The establishment of the rates in question by the State Commission will be a lawful exercise of such local police power functions.

V. Neither through the enactment of the Civil Aeronautics Act nor through the enactment of the Outer Continental Shelf Lands Act has the Congress preempted the authority of the State Commission to establish rates for the transportation in question.

The legislative history of Section 1(21)(a) of the Civil Aeronautics Act 49 U. S. C. 401(21)(a) shows that the Congress intended to authorize the Civil Aeronautics Board to regulate rates for transportation between points in the same state over that portion of the high seas where international or interstate relationships are involved in which case there is the same need for Federal regulation as exists when the transportation is between places in the same state over another state.

The need for Federal regulation of the rates for transportation between the mainland of California and Catalina Island which passes over seas local to if not within the territorial boundaries of the State of California is not the same as the need for Federal regulation of rates for transportation between points in the State of California over the

State of Nevada, for example. In other words the rates for such transportation being a matter of local concern to the people of the State of California, the transportation over the route in question is within the jurisdictional boundaries, if not the geographical boundaries, of the State of California, and does not go over *a place outside thereof* within the meaning of Section 1(21)(a) of the Civil Aeronautics Act. Hence the State Commission can regulate the rates for transportation between the mainland of California and Catalina Island.

To satisfy appellee air carriers we again refer to the authorities in support of the foregoing:

U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress, Vol. 1, page 68, *Letter from Joseph B. Eastman, Federal Coordinator of Transportation, to Senator Burton K. Wheeler;*

Wilmington Transportation Co. v. *Railroad Commission,* 236 U. S. 151, 156;

United Air Lines, Inc., et al., 50 Cal. P. U. C. 563; review denied, *United Air Lines* v. *Commission,* 37 A. C. 633, 1; appeal dismissed, *United Air Lines* v. *Commission,* 342 U. S. 908.

In the event the route in question passed over the high seas within the extended boundary lines of an adjacent sister state or foreign country perhaps this Court would hold that the operation was no longer solely of local concern to the people of the State of California and hence that the rates therefore could not be regulated by California. In such case the same need for Federal regulation might exist as in the situation where the flight passes between points in California but over the State of Nevada, for example.

On page 14 of the brief for the Civil Aeronautics Board the Civil Aeronautics Board declares that as the deepest part of San Pedro Channel is in excess of 450 fathoms that it

is beyond the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act, P. L. 212, 83rd Cong., 1st Session, 67 Stat. 462.

We have reviewed House Report No. 413, to accompany H. R. 4198 and find no reference to the boundaries of the outer Continental Shelf of the United States along the Pacific Coast States. True enough House Report No. 413 to accompany H. R. 4198 contains the statement: "Generally this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600 feet, and, for convenience, this depth is used as a rule of thumb in defining the outer limits of the shelf." But the report also continues: "Along the Atlantic coast, the maximum distance from the shore to the outer edge of the shelf is 250 miles and the average distance is about 70 miles. In the Gulf of Mexico, the maximum distance is 200 miles and the average is about 93 miles * * *"

This Court will take judicial notice of the fact that conditions along the Atlantic Coast are different from those along the Pacific Coast. For example, the Atlantic Coast is sinking, whereas the Pacific Coast is rising. Also along the Atlantic Coast there are no islands belonging to the United States comparable to Catalina and the chain of large islands along the Pacific Coast. It is inconceivable to appellants that the President of the United States would exclude any portion of San Pedro Channel from the outer Continental Shelf in determining and publishing the boundaries in the Federal Register as directed in Section 4 of the Outer Continental Shelf Lands Act, assuming that some portion of San Pedro Channel is not within the geographical boundaries of the State of California.

There is no question that the lands and waters of San Pedro Channel historically are a part of the United States. Through the enactment of the Outer Continental Shelf Lands Act, Congress did not intend to give up claims to the lands and waters between the mainland of California and

Catalina Island. Even though this Court find that portions of San Pedro Channel are not within the geographic boundaries of the State of California surely there will be no finding that any of the lands beneath San Pedro Channel do not appertain to the United States and are not subject to its jurisdiction and control.

Section 3 of the Outer Continental Shelf Lands Act provides:

"Sec. 3. Jurisdiction Over Outer Continental Shelf. —(a) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

"(b) This Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected."

Section 4 of this Act in part provides as follows:

"Sec. 4. Laws Applicable to Outer Continental Shelf.—(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

"(2) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this Act are hereby

declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

We have demonstrated that the provisions of the California Constitution authorizing the State Commission to establish rates for the operations in question are not inconsistent with the Federal law. The provisions of the Outer Continental Shelf Lands Act makes this State law the law of the United States in so far as the outer Continental Shelf off the Coast of California is concerned. The only difference is that transactions concerning these rates within the boundaries of the State of California will be governed by State law administered by State officials whereas transactions concerning these rates within the outer Continental Shelf in the area bounded by the seaward extended boundaries of the State of California will be governed by State law administered by Federal officials and courts. In both cases the establishment of the rates which is legislative in character and amounts to the enactment of law will be performed by the State officials in so far as they involve transportation between points both of which are within the State of California even though the route may pass over the outer Continental Shelf lands within the extended boundaries of the State of California.

We submit that neither through the enactment of the Civil Aeronautics Act nor through the enactment of the Outer Continental Shelf Lands Act has the Congress preempted

the authority of the State Commission to establish rates for the operations in question.

Conclusion

In view of the foregoing additional argument we again respectfully submit that this Court should dispose of this case on the procedural grounds, heretofore urged, which are of jurisdictional substance. If the merits of this case are reached, we further respectfully submit that the final decision must nevertheless be in favor of appellants.

Dated, November 12, 1953.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel.
J. THOMASON PHELPS,
Senior Counsel.
WILSON E. CLINE,
Attorneys for Appellants.